

**IN THE SUPREME COURT
STATE OF MISSOURI**

IN RE:

JAY R. YORKE,

Respondent.

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Supreme Court #SC93329

RESPONDENT’S BRIEF

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STATEMENT OF JURISDICTION

Respondent hereby adopts the Statement of Jurisdiction contained in Informant's Brief.

STATEMENT OF FACTS

Respondent hereby adopts the Statement of Facts contained in Informant's Brief and includes the following Supplements:

Mr. Yorke is not being accused of dishonesty in any of the counts that have been filed by Informant. (L.F. 115-140). Additionally, Mr. Yorke has never been accused of stealing or in any way misappropriating any of his clients' money. *Id.*

POINT RELIED ON

A STAYED SUSPENSION WITH PROBATION IS WARRANTED IN THIS CASE BECAUSE CASE LAW, COURT RULES AND ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS SUPPORT THIS LEVEL OF DISCIPLINE IN THAT RESPONDENT ENGAGED IN CONDUCT WITH RESPECT TO HIS LACK OF DILIGENCE, FAILURE TO COMMUNICATE, FAILURE TO EXPEDITE LITIGATION AND CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE, BUT RESPONDENT ACKNOWLEDGES HIS MISCONDUCT AND MENTAL HEALTH ISSUES AND THE PROPOSED PROBATION CONDITIONS ENSURE HE IS PROPERLY MONITORED AND UNDERGOES CONTINUED TREATMENT AND PROVIDES A WAY FOR INFORMANT TO CLOSELY MONITOR MR. YORKE’S CONDITIONS, ACTIONS, AND CONDUCT.

In re Coleman, 295 S.W.3d 857 (Mo. Banc 2009)

In re Wiles, 107 S.W.3d 228 (Mo. Banc 2003)

In re Ehler, 319 S.W.3d 442 (Mo. Banc 2010)

ABA Standards 9.0 *et seq.*

Mo.R.Civ.P. Rule 5.225

ARGUMENT

A STAYED SUSPENSION WITH PROBATION IS WARRANTED IN THIS CASE BECAUSE CASE LAW, COURT RULES AND ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS SUPPORT THIS LEVEL OF DISCIPLINE IN THAT RESPONDENT ENGAGED IN CONDUCT WITH RESPECT TO HIS LACK OF DILIGENCE, FAILURE TO COMMUNICATE, FAILURE TO EXPEDITE LITIGATION AND CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE, BUT RESPONDENT ACKNOWLEDGES HIS MISCONDUCT AND MENTAL HEALTH ISSUES AND THE PROPOSED PROBATION CONDITIONS ENSURE HE IS PROPERLY MONITORED AND UNDERGOES CONTINUED TREATMENT AND PROVIDES A WAY FOR INFORMANT TO CLOSELY MONITOR MR. YORKE'S CONDITIONS, ACTIONS, AND CONDUCT.

“The fundamental purpose of an attorney disciplinary proceeding is to protect the public and maintain the integrity of the legal profession.” *In re Coleman*, 295 S.W.3d 857, 869 (Mo. Banc 2009). This court relies upon the ABA Standards when imposing sanctions. When determining the appropriate penalty for an attorney that has violated the rules of professional conduct, the court considers the gravity of the attorney's misconduct as well as any mitigating or aggravating factors that tend to shed light on Respondent's moral and intellectual fitness as an attorney. *In re Wiles*, 107 S.W.3d 228, 229 (Mo.

Banc 2003). In determining the appropriate sanction to impose after a finding of misconduct, this court has held any such sanction should be consistent with the sanction for the most serious instance of misconduct among the violations committed. *In re Ehler*, 319 S.W.3d 442, 451 (Mo. Banc 2010).

ABA Standard 3.0 provides, “In imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors: (a) the duty violated; (b) the lawyer’s mental state; (c) the potential or actual injury caused by the lawyer’s misconduct; and (d) the existence of aggravating or mitigating factors.” Further, “the ABA Standards look at the actual injury to the client as well as the potential injury to the client, public, and legal system or profession that is reasonably foreseeable at the time of the lawyer’s misconduct.” *In re Coleman*, 295 S.W.3d at 870 (internal cites omitted).

In the case at bar, the parties have previously stipulated to a punishment of a stayed suspension with probation, including additional measures to ensure Mr. Yorke is being properly evaluated, undertakes corrective treatment, education, and is monitored throughout the time of his probationary term. Missouri Supreme Court Rule 5.225 provides that, “a lawyer is eligible for probation if the lawyer: (a) is unlikely to harm the public during the period of probation and can be adequately supervised; (b) is able to perform legal services and is able to practice law without causing the courts or profession to fall into disrepute; and (c) has not committed acts warranting disbarment.” Consequently, the sanctions that have been proposed by Informant and Respondent are consistent with Rule 5.225(a)(2)’s requirements for probation.

Probation is also consistent with similar cases that have been decided by this court. In *Coleman, supra*, this court found the Respondent violated Rules 4-1.2, 4-1.5, 4-1.7, 4-1.16, and 4-8.4(d). The cited violations in *Coleman* included agreeing to settle a case without the client's consent, comingling funds and failing to keep an adequate Trust Account record, created a conflict of interest from the contingent fee contract drafted by Respondent, failure to notify the client of withdrawal as counsel, and otherwise violating multiple rules of professional conduct which can be generally described as conduct prejudicial to the administration of justice. *Coleman*, 295 S.W.3d at 862-63. Further, the attorney in *Coleman*, was initially licensed to practice law in Missouri in 1977. In 1990 Mr. Coleman was admonished for failure to communicate with his client and for unreasonable fees. In 1999 he was again admonished with failure to act with reasonable diligence, to expedite litigation and to communicate with his client. In 2008, Mr. Coleman received a public reprimand for violations regarding diligence, unreasonable fees, and conduct prejudicial to the administration of justice. *Coleman*, 295 S.W.3d at 859. These three admonitions were all separate and apart from those being dealt with in the *Coleman* opinion.

It was found that Mr. Coleman committed numerous violations in the case at issue, and had a much more extensive disciplinary history than Mr. Yorke in the case at present. Prior to the case at bar, Mr. Yorke has been admonished one time prior for lack of diligence by failing to timely file a lawsuit within the applicable statute of limitation and failure to communicate with his client. (L.F. 168).

The court in *Coleman*, found the attorney's misconduct could be remedied by education and supervision, and that his violations made him a proper subject for probation. *Id* at 871. Ultimately, the court did order the Respondent in *Coleman*, suspended without leave to re-apply for one year, but said suspension was stayed and various probationary terms were imposed. *Id*.

Similarly, both Informant and Respondent in the case at present are requesting suspension, with execution stayed while Mr. Yorke is placed on probation under the proposed terms and conditions. This resolution is consistent with Missouri rules, case law, and ABA standards.

Mr. York has admitted to numerous infractions, with the most serious infraction being his failure to exercise diligence, resulting in the statute of limitations running on two separate claims. Missouri case law and ABA Standards do provide that suspension is generally applicable when a lawyer knowingly fails to perform services for a client and causes injury or a lawyer engages in a pattern of negligence and causes injury. See ABA standard 4.42. However, the court must also consider any mitigating circumstances when determining what sanction to impose. See *In re Carey*, 89 S.W.3d 477, 502 (Mo. Banc 2002); and *ABA Standards 9.0 et seq*.

Several mitigating factors exist in the case at bar. Mr. Yorke has admitted wrongdoing. (L.F. 168); *ABA Standards* §9.32(e). Mr. Yorke is remorseful of his actions. (L.F. 168); *ABA Standards* §9.32(1). At the time of the misconduct Mr. Yorke was suffering from attention deficit hyperactivity disorder and anxiety disorder not otherwise specified. See *Mental Health Records filed under seal*; (L.F. 168); *ABA Standards*

§9.32(c). Respondent is undergoing treatment for his conditions and his treating physician believes he is much improved. *See Mental Health Records filed under seal*; (L.F. 168); *ABA Standards* §9.32(c). Additionally, unlike *Coleman* where Respondent had at least three prior admonishments, Mr. Yorke has only had one other admonishment in his approximately 24 year legal career. (L.F. 168).

Further, the terms of the proposed probationary period will ensure the three requirements for probation under Rule 5.225, cited *supra*, are followed. First, Mr. Yorke has not committed any acts that would warrant disbarment. Second, Mr. Yorke is not likely to harm the public during the period of probation and can be adequately supervised. Pursuant to the proposed probationary terms, Mr. Yorke is to be monitored by the OCDC, he shall submit written quarterly reports concerning the status of his practice, carry malpractice insurance, attend Ethics School, attend the Solo & Small Firm Conference of the Missouri Bar, take the Multistate Professional Responsibility Exam, obtain a mental health evaluation and follow its recommendations, and obtain a mentor to help guide and advise Mr. Yorke. (L.F. 179-185). Third, Mr. Yorke is able to perform legal services and able to practice law without causing the courts or profession to fall into disrepute.

Mr. Yorke has a much less extensive disciplinary history than the Respondent in *Coleman*. Likewise, the Respondent in *In Re Wiles*, 107 S.W.3d 228 (Mo. Banc 2003), cited by Informant, had a much more extensive disciplinary history than Mr. Yorke. Additionally, Mr. Yorke's shortcomings are largely based on missing deadlines and failing to keep his clients informed. Mr. Yorke is not being accused of dishonesty in any

of the counts that were filed by Informant. Further, Mr. Yorke has never been accused of stealing or in any other way misappropriating his clients' money. The cases cited herein, the facts at issue, and the stipulations of probation listed above, will insure Mr. Yorke will not violate the requirements of Rule 5.225(a)(2) and probation is warranted in this case.

In summary, Mr. Yorke has admitted to the violations as stated by Informant. Mr. Yorke is remorseful for his actions and prepared to take all necessary steps to prevent any similar instances from occurring in the future. The preventative measures found in the proposed Probationary Requirements will guide and oversee Mr. Yorke in his future practice of law during the probationary term. The mitigating factors and proposed probationary terms make Mr. Yorke eligible for probation pursuant to Rule 5.225, rather than full suspension. Probation would also be consistent with Missouri case law, ABA Standards, and Missouri Rules. For this reason, Respondent requests the court adopt the recommendation of The Disciplinary Hearing Panel.

CONCLUSION

For the above stated reasons, Respondent adopts the request of Informant and asks the Court to enter an order: finding that Mr. Yorke violated Rules 4-1.3, 4-1.4, 4-3.2, and 4-8.4(d), suspending Mr. Yorke from the practice of law without leave to reapply for one year, with the execution of his suspension stayed, placing Mr. Yorke on probation for two years in accordance with the proposed Probation Term and Conditions (L.F. 178-186), assessing the costs of this disciplinary proceeding against Mr. Yorke, and taxing the \$1,000 fee for the suspensions.

Respectfully submitted,

By: /s/ James E. Spain
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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of September, 2013, a true and correct copy of the foregoing was served via the electronic filing system pursuant to Rule 103.08 on:

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/s/ James E. Spain
James E. Spain

CERTIFICATION: RULE 84.06(c)

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Rule 84.06(b);
3. Contains 1,888 words, according to Microsoft Word, which is the word processing system used to prepare this brief.

/s/ James E. Spain
James E. Spain